Filed 6/3/2004

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JAREY STEWART, Defendant and Appellant.	C040094 (Super.Ct.No. 00F08190)

APPEAL from a judgment of the Superior Court of Sacramento County, Renard Shepard, Judge. Remanded and affirmed.

Maribeth Halloran, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, John G. McLean, Supervising Deputy Attorney General, George M. Hendrickson, Deputy Attorney General, for Defendant and Appellant.

Defendant was convicted by a jury of three counts of lewd and lascivious conduct (Pen. Code, § 288, subd. (a)), one count of aggravated lewd and lascivious conduct (Pen. Code, § 288,

---

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I, II, III, IV, V and VII of the Discussion.

subd. (b)(1)), and one count of aggravated sexual assault (Pen. Code, § 269, subd. (a)(4)). He was sentenced under both the one strike law (Pen. Code, § 667.61, subd. (b)) and the three strikes law (Pen. Code, § 667 subds. (b)-(i)) to three consecutive indeterminate terms of 15 years to life, each tripled to 45 years to life (Pen. Code, § 667, subd. (e)(2)(A)(i)). Sentence for the remaining offense was stayed pursuant to Penal Code section 654. He also received determinate terms of five years for a prior serious felony conviction (Pen. Code, § 667, subd. (a)) and one year for a prior prison term (Pen. Code, § 667.5, subd. (b)). Defendant's aggregate term was thus 135 years to life, plus 6 years.

Defendant appeals, claiming (1) violation of his Sixth Amendment right to counsel; (2) violation of his Fifth Amendment right not to testify; (3) instructional errors; and (4) sentencing errors. We conclude that the matter must be remanded for resentencing but otherwise affirm the judgment.

FACTS AND PROCEEDINGS

The offenses charged in this matter occurred in September and October 2000. At the time, defendant was living with Evelyn S.S. and her two daughters, 10-year-old S.S. and four-year-old M.S. Defendant was 43 years old and is M.S.'s father.

On September 3, 2000, while Evelyn was away at work, defendant told the girls to take off their clothes while he videotaped them. He continued to videotape the girls as they ran around the house and later took a bath. At one point on the

video, defendant tickled S.S., touching her breasts and her buttocks. At another point, defendant forced M.S. to sit on his lap. Both defendant and M.S. were naked. Defendant told the girls not to tell their mother about the videotape, because it was going to be a surprise for her.

On October 1, 2000, Evelyn was again away at work and defendant and S.S. were in defendant's bedroom watching television. M.S. was asleep in her room. Defendant told S.S. to take off her clothes in an "urging" voice and, after she did so, he told her to lie down and began rubbing lotion on her. She obeyed because she was scared and thought defendant might hit or do something else bad to her. Defendant told S.S. to relax, that he always did this to her mother. Defendant rubbed her arms, legs and chest. Later, defendant began licking her vagina. After about five seconds, S.S. began pushing defendant's head away. Defendant continued to orally copulate her for two or three minutes; she told him three times to stop.

Defendant then told S.S. to take a shower. She did so and when she stepped out of the shower, she found defendant in the bathroom with her. Defendant told her that if she did not tell her mother what he had done, he would buy her any compact disk she wanted; she declined. Defendant then asked if he could rub lotion on her again, but she said no. She then put on her clothes and went to sleep.

The next morning, S.S. told her mother what had happened. Evelyn asked defendant what he had done and defendant responded, "It just happened." Evelyn asked defendant if he wanted to

spend the rest of his life in prison and he asked her to "just let [him] go." Evelyn reported the matter to the police. While at the police station, Evelyn called defendant at home and asked him about the incident. The telephone conversation was recorded and later played to the jury. During the conversation, defendant admitted licking S.S.'s vagina and telling her that he did this to her mother. Defendant said this was the only time he did it and that he was ashamed.

Two weeks after calling the police, Evelyn discovered the videotape that defendant had made of the girls on September 3. Portions of the tape were played to the jury.

Defendant was charged with one count of aggravated sexual assault (Pen. Code, § 269, subd. (a)(4)), one count of lewd and lascivious conduct (Pen. Code, § 288, subd. (a)), and one count of aggravated lewd and lascivious conduct (Pen. Code, § 288, subd. (b)) in connection with the October 1 incident with S.S. He was charged with two counts of lewd and lascivious conduct in connection with the September 3 taping. Defendant was also charged with two prior serious felony convictions.

Defendant was found competent to stand trial and entered pleas of not guilty and not guilty by reason of insanity. During the initial stages of the proceedings, defendant requested to be permitted to represent himself with cocounsel. The court denied the request. Defendant then elected to represent himself and asked to have counsel appointed in an advisory role. The court denied this request as well, but ordered stand-by counsel for defendant.

At the guilt phase of the proceedings, defendant testified on his own behalf, explaining that during the September 3 taping, he did not intend to appeal to the sexual desires of either himself or the girls. Regarding the October 1 incident, defendant testified that he had taken several pain medications that day. He said he was a nurse and had been trained to give massages. He massaged S.S. as he had been trained to do. After defendant finished the massage, he sat down at the end of the bed. He then heard Evelyn's voice say "go ahead," which is what she said when they were going to have sex. Defendant started to orally copulate S.S., thinking she was Evelyn. It was not until defendant heard S.S. say stop that he realized who she was. He said to S.S., "You tricked me. How did you do that?"

Defendant also presented the testimony of a registered nurse regarding the side effects of the various medications defendant claimed to have taken.

Defendant was convicted on all counts. The prior conviction charges were then tried to the jury and were found true.

At the sanity phase, defendant presented the testimony of a nurse at the county jail, who had written a report indicating defendant had obvious psychological problems. She further clarified on the stand that defendant had "behavioral problems." Dr. Janice Nakagawa testified that defendant suffered from a "personality disorder," but that defendant knew what he was doing at the time and could tell right from wrong and predict the consequences of his actions. Dr. Shawn Johnston testified

that defendant suffers from a character flaw that causes him to make trouble for others or himself. However, according to Dr. Johnston, none of these character flaws would have kept defendant from understanding what he was doing or from distinguishing right from wrong. However, neither of these psychological experts was qualified to assess the effects on defendant of the several medications that he claimed to have taken at the time of the October 1 incident.

Defendant again testified on his own behalf, indicating that he had signs and symptoms of temporal lobe epilepsy, schizophrenia, and multiple personality complicated by medications. Defendant testified that he "can sometimes catch glimpses of ghosts when they come" because he is "hyper sensitive, kind of like a person with ESP." He indicated that he has "shown the signs and symptoms of a person with severe depression which may be characterized by bipolar disorder or manic depression." Defendant considered himself insane in October 2000 because his perception of reality was different from that of others. He explained that he went into a "dream-like state" about an hour before the molestation as a result of the medications he had taken.

The jury found defendant sane with respect to all five counts. He was thereafter sentenced as indicated previously.

DISCUSSION

I

Sixth Amendment Right to Counsel

Defendant contends that he was denied the right to counsel at various stages of the proceedings. He argues he sought to represent himself only as to the bifurcated trial of the priors, but the trial court forced him to choose between representation by counsel for the entire case or self-representation. Faced with that choice, he chose to represent himself.

"The Sixth Amendment right to the assistance of counsel applies at all critical stages of a criminal proceeding in which the substantial rights of a defendant are at stake. [Citation.] The right to counsel may be waived by a defendant who wishes to proceed in propria persona. [Citation.] By such waiver, a defendant surrenders 'many of the traditional benefits associated with the right to counsel.' [Citation.] In view of these consequences, a knowing and intelligent waiver of the right to counsel is required before a criminal defendant is permitted to proceed in propria persona." (*People v. Crayton* (2002) 28 Cal.4th 346, 362.)

Although a defendant in a criminal proceeding has a constitutional right to counsel as well as a constitutional right to represent himself, "these rights are mutually exclusive." (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1003.) "[A]t all times the record should be clear that the accused is either self-represented or represented by counsel; the accused

cannot be both at once." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1219.) However, a defendant may be represented by counsel at one phase of the proceedings and represent himself at another. (See *People v. Crayton*, *supra*, 28 Cal.4th at p. 362 ["Federal authority holds that once a defendant gives a valid waiver [of the right to counsel], it continues through the duration of the proceedings unless it is withdrawn or is limited to a particular phase of the case"].)

Defendant contends that he "filed a motion requesting counsel for all phases of trial, except trial of the allegations of priors." That motion specified that defendant expressly made no waiver of the right to counsel as to any other phase of the trial. Defendant contends "[t]he trial court radically transformed [his] request for self-representation or hybrid representation for trial of the priors phase only[] into an order requiring a pro se defense for all trial phases."

Defendant's request for limited self-representation was not as clear as he suggests. At the preliminary hearing, defendant was represented by Theresa Huff. Later, Huff was replaced by David Marcolini. At a hearing on May 3, 2001, Marcolini informed the court that defendant wished to file ex parte motions to obtain his legal files in a prior matter and to recuse the prosecutor. The court indicated it would not accept motions from defendant because he was represented by counsel and only counsel could file motions on defendant's behalf. Defense counsel then declared a doubt as to defendant's mental ability to contribute to his defense. The court ordered the proceedings

suspended for determination of defendant's mental competence (Pen. Code, § 1368).

On June 14, 2001, the court ruled defendant competent and reinstated proceedings. Defense counsel announced that defendant wished to file a motion for self-representation (*Faretta v. California* (1975) 422 U.S. 806, 807 [45 L.Ed.2d 562, 566]).

On June 26, defendant filed a number of motions in propria persona, including motions to dismiss, to recuse the prosecutor, and to suppress evidence. On June 29, defendant filed a "Notice of Substitution of Attorney" stating that he would be defending the action in propria persona. Defendant also filed a "Motion for Substitution of Counsel," which requested an order "to dismiss and relieve counsel due to inadequate representation . . . ." Along with this latter motion, defendant submitted a declaration, stating that counsel failed to confer with him regarding preparation of the defense, refused to communicate with him, refused to subpoena witnesses, failed to investigate, failed to secure expert witnesses, failed to file critical motions, failed to present evidence at hearings, and failed to assert a prosecutorial conflict. However, defendant also stated that his attorney had agreed to act as cocounsel.

In the memorandum of points and authorities accompanying this motion, defendant indicated he "has repeated[ly] stated his desire to preserve his pro[.] per[.] status *regarding the issue of prior conviction allegations* raised in the instant matter by

the prosecutor" and stated that a "hybrid representation would be appropriate [citation] for the limited purpose of challenging the validity of the prior conviction allegations . . . ." Defendant stated that he did not wish to exercise his right to self-representation on new allegations.

On July 20, 2001, defendant appeared with counsel to argue his motions. The court asked if defendant wanted to represent himself or to have a different attorney. Defendant responded that he wanted to have "co-counsel status" with Marcolini. The court denied that request. Marcolini then informed the court that defendant wanted cocounsel status in order to have access to the law library. The court indicated that it could order defendant be given access to the law library, although not at the level of a self-represented party. Defendant argued that he wanted cocounsel status because he represented himself in the prior prosecutions and would be the best person to litigate the priors. The court repeated that it would not order cocounsel status, but would see that defendant received limited law library access. Defendant then said, "In that case I will elect to represent myself in pro[.] per." Defendant requested that Marcolini be appointed advisory counsel, and the court declined. Defendant was then advised of the risks of representing himself, and the court appointed Marcolini as stand-by counsel.

Although in his motion for substitution of counsel, defendant stated his desire to represent himself only as to the priors, he also stated his dissatisfaction with counsel. In another filing, defendant declared his intent to represent

himself without limitation. Thus, at the hearing on defendant's motions, the court understandably asked for clarification of defendant's requests. At that time, defendant gave no indication that he wished to waive counsel only as to the trial of the priors. He asked for cocounsel status; it was denied. The court was informed that defendant wanted to represent himself in order to obtain law library privileges. The court stated it would grant such privileges on a limited basis, without defendant being required to represent himself. Defendant nevertheless requested self-representation without limitation. He was thereafter given full advisement of the dangers of self-representation.

Based on the totality of the record, it appears defendant abandoned any thought of limited self-representation, at least at this stage of the proceedings, in favor of total self-representation in order to have full access to the law library and to have control of his defense. There was no denial of defendant's right to counsel.

Defendant contends that the trial court erred in denying his request for cocounsel. He argues that he made a sufficient showing of good cause for cocounsel and his attorney consented to such representation.

A defendant is not entitled to counsel and to represent himself at the same time. (*People v. Matson* (1959) 51 Cal.2d 777, 789.) "Whether a professionally represented defendant may participate in the presentation of the case is a matter within

the sound discretion of the trial judge." (*People v. Kirkpatrick*, *supra*, 7 Cal.4th at p. 1004.)

Defendant contends that the trial court rejected his request out-of-hand, without exercising its discretion. In response to defendant's request for cocounsel, the court stated: "That's denied, sir. I would not do that." Defendant argues that "[b]y so ruling the trial court violated its obligation to consider [his] request for co-counsel status on the merits."

The court's statement does not show that it failed to exercise discretion. The statement was a declaration of the court's conclusion, nothing more. Absent a contrary showing, we presume official duty has been regularly performed. (Evid. Code, § 664; *People* v. *Frye* (1994) 21 Cal.App.4th 1483, 1486; *People* v. *Young* (1991) 228 Cal.App.3d 171, 186.) Furthermore, as to defendant's showing of good cause, he argues that he informed the court he had "unique knowledge" regarding the priors. Defendant did not explain how this unique knowledge could not have been imparted to counsel or whether that knowledge related to the issue of defendant's conviction for those offenses rather than the merits of the charges. There was no abuse of discretion in this instance.

Defendant next argues that the trial court violated the Sixth Amendment when on August 13, 2001, it denied his request for counsel at the sanity trial. Defendant argues: "It was critical that counsel immediately investigate and obtain expert assistance regarding the drugs [defendant] testified he had taken on October 1, 2000 and their probable effects upon

[defendant], and obtain the appointment of a psychiatrist to investigate and assist counsel in the presentation of the insanity defense."

On August 13, 2001, defendant changed his plea to not guilty and not guilty by reason of temporary insanity. He then stated: "And I also ask that Mr. Marcolini be appointed as counsel to that phase of the trial." The court asked if defendant wanted to withdraw as his own counsel. Defendant responded that he wished to represent himself at the guilt phase but wanted Marcolini represent him at the sanity phase. The trial judge declined to rule on defendant's request at that time, indicating he needed to review certain records and look into the matter.

The request was not brought up again until after defendant was convicted. At that time, defendant made a number of motions that were denied by the court. He then asserted that at the time he chose to represent himself, he asked for representation of counsel at the sanity trial. The following colloquy ensued:

"THE COURT: What are you saying, you want Mr. Marcolini to represent you in the sanity phase?

"THE DEFENDANT: No. What I'm saying, I was never appointed counsel, and then I subsequently had to undergo the psychiatric exams without counsel. I had reports done without counsel. I had no advice.

"THE COURT: You weren't entitled to counsel back then. You were representing yourself.

"THE DEFENDANT: In the guilt phase. I had to undergo proceedings that were relating [*sic*] to the sanity phase totally unadvised and totally without counsel.

"THE COURT: Okay, we are going to start the sanity phase this week. Do you want counsel to represent you, or do you want to represent yourself?

"THE DEFENDANT: At this point I have no choice but to represent myself.

"THE COURT: No. What do you mean, you have no choice? You have a choice, if you want an attorney to come in and represent you now. That's why he is standby counsel.

"THE DEFENDANT: Standby doesn't count for anything. He doesn't advise the case. I cite, it's below the Sixth Amendment Constitutional rights standards to only have standby counsel.

"THE COURT: So you are telling me you don't want Mr. Marcolini to come in now and handle the sanity phase?

"THE DEFENDANT: Not at this phase, because he can do no more than what I can do."

Defendant was given an opportunity before the sanity trial to have counsel appointed, but he declined. Defendant contends that he was not harmed by lack of representation at the sanity trial itself, but by lack of representation during the preparation for that trial. However, the trial court did not deny defendant's motion for counsel on August 13. At that time, it deferred ruling on the motion. The matter was not brought up again until after defendant was convicted. Where a defendant does not secure a ruling on a point, it is not preserved for

appeal. (*People v. Rowland* (1992) 4 Cal.4th 238, 259.) Because defendant failed to pursue his motion and obtain a ruling, he waived any claim of error.

Defendant next contends that the trial court violated the Sixth Amendment when it failed to grant his request for counsel at sentencing.

After the jury found defendant to be sane at the time of the offenses, the court scheduled judgment and sentence for December 14, 2001. However, the court indicated that this probably would not take place because defendant had indicated he would be filing some posttrial motions. Defendant thereafter filed various motions. At the December 14 hearing, defendant also moved to strike the probation report. He complained about not having had an opportunity to meet with the probation officer to clarify inaccuracies in the report. The court ruled on various motions, defendant waived time and the matter was put over until January 18, 2002.

Defendant filed further motions, including a motion for appointment of cocounsel. As to the latter, defendant argued that he needed assistance in various matters relating to his motion for new trial. He also prepared and filed his own probation report.

The matter was next heard on December 21, 2001. At the time, the court indicated that the case had been moved up from January 18, 2002, because defendant had been given an opportunity to meet with the probation officer earlier than expected. The court then ruled on defendant's motions.

Regarding the motion for cocounsel, defendant stated that the motion "was for co-counsel, so [he] could be prepared for sentencing." Defendant stated that he had no idea the court was going to pronounce judgment and sentence him at that hearing. The court responded: "You decided to go pro per. You are not entitled to co-counsel. That's clear in the Court of Appeal case of Scott versus Superior Court, that you are not entitled to co-counsel. [¶] And as far as interviewing jurors, you had a motion regarding interviewing jurors. That's something your investigator can do, interview jurors, if you put forth proper documentation as to why you want to interview the jurors. [¶] So I'm going to deny the motion for appointment of co-counsel. . . ." Defendant thereafter objected to various portions of the probation report. Just prior to sentencing, defendant repeated for the record that he was not prepared for sentencing because he "had documentation that [he] wanted to submit for the record" and he wanted to have cocounsel appointed and speak with him. The court then proceeded with sentencing.

Defendant contends that under the circumstances, his request for counsel should have been granted. Defendant cites *People v. Windham* (1977) 19 Cal.3d 121, in which the state high court explained that when a defendant makes a midtrial request for self-representation, the court must inquire into the factors underlying the request, including "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or

delay which might reasonably be expected to follow from granting such a motion." (*Id.* at p. 128.) Defendant argues that applying the *Windham* factors in this case "compels the conclusion that [defendant's] request for counsel . . . should have been granted when it was made at sentencing."

The problem with defendant's argument is that he did not request counsel at sentencing, he requested cocounsel. As explained previously, the right to cocounsel is a matter of court discretion. (*People v. Kirkpatrick*, *supra*, 7 Cal.4th at p. 1004.) The court had denied defendant's request for cocounsel earlier. He submits no argument as to how the court abused its discretion in denying his renewed request. Furthermore, defendant's written motion concerned matters relating to his motion for new trial, not sentencing. Defendant provided the trial court with no basis for the appointment of either counsel or cocounsel at sentencing. There was no Sixth Amendment violation.

II

Advisement of Right Not to Testify

Defendant contends that he was denied his Fifth Amendment right not to testify when the trial court failed to advise him of this right before he took the stand in his defense. Two Court of Appeal decisions -- *Killpatrick v. Superior Court* (1957) 153 Cal.App.2d 146, 149-150 and *People v. Kramer* (1964) 227 Cal.App.2d 199, 201-203 -- held that a trial court must

advise a self-represented defendant of his right not to testify before he or she takes the stand.

However, in *People v. Barnum* (2003) 29 Cal.4th 1210, a decision issued after defendant filed his opening brief in this matter, the state high court rejected the *Killpatrick-Kramer* rule. The court indicated that such rule conflicts with two deeply rooted principles of law: (1) "[A] 'defendant who chooses to represent himself assumes the responsibilities inherent in the role which he has undertaken,' and 'is not entitled to special privileges not given an attorney . . .'" and (2) "'the judge ordinarily is not required to assist or advise' a 'defendant who chooses to represent himself' 'on matters of law, evidence or trial practice.'" (*People v. Barnum*, *supra*, 29 Cal.4th at pp. 1221-1222.) Based on these principles, plus the fact the *Killpatrick-Kramer* rule "is not itself the privilege against compelled self-incrimination," but only a "prophylactic rule of procedure" and "does not have any counterpart in the federal courts or in the courts of the vast majority of our sister states," the court concluded that the rule cannot stand. (*Id.* at p. 1225.)

In light of *People v. Barnum*, we reject defendant's Fifth Amendment claim.

III

Mistake of Fact Instruction

The jury was instructed on mistake of fact pursuant to CALJIC No. 4.35 as follows: "An act committed or made in

ignorance or by reason of a mistake of fact which disproves any criminal intent is not a crime. [¶] Thus, a person is not guilty of a crime if he commits an act under an actual belief in the existence of certain facts and circumstances which, if true, would make the act lawful." Defendant requested that the court add to the end of the instruction, "delusion and its effect must be judged as real . . . ." The court refused to modify the instruction.

Defendant contends that the court violated his Sixth and Fourteenth Amendment rights by denying the modification. He argues that instead of rejecting the modification, "the court was obligated to tailor a proper pinpoint instruction relating defense evidence to the elements to be proved . . . ." Defendant further contends that the court was required to instruct the jury on the burden of proof relating to the mistake-of-fact defense. The People respond that the proposed instruction was impermissibly argumentative and is an inaccurate statement of the law and that, at any rate, defendant was not prejudiced by the absence of a modification. They further argue that the instructions as a whole adequately informed the jury of the applicable burden of proof.

The Penal Code includes among those incapable of committing a crime, "Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent." (Pen. Code, § 26, subd. (3).) "When a person commits an act based on a mistake of fact, his guilt or

innocence is determined as if the facts were as he perceived them." (*People v. Scott* (1983) 146 Cal.App.3d 823, 831.)

On request, a defendant is entitled to an instruction that pinpoints the crux of his case. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885; *People v. Wharton* (1991) 53 Cal.3d 522, 570.) In such an instruction, "'[w]hat is pinpointed is not specific evidence as such, but the *theory* of the defendant's case.'" (*People v. Wright* (1988) 45 Cal.3d 1126, 1137.)

Defendant argues that California law supports a request for a pinpoint instruction directing the jury's attention to defense *evidence* of temporary delusion as a basis for reasonable doubt that he harbored the mens rea necessary for the offenses committed against S.S. on October 1. He cites as support *People v. Hall* (1980) 28 Cal.3d 143, 158-159, and *People v. Sears* (1970) 2 Cal.3d 180, 190, where it is said that a defendant has a right to an instruction directing the jury's attention to evidence from which a reasonable doubt could arise. However, in *People v. Wright*, *supra*, 45 Cal.3d at pages 1136-1137, the court disavowed any such suggestion, indicating instead that a defendant has a right to an instruction relating a defense theory, rather than defense evidence, to an element of the offense. Defendant also cites *People v. Cash* (2002) 28 Cal.4th 703, 740, in which the court upheld the following instruction: "'If you find that defendant attempted to suppress evidence against him in any manner, such as by intimidation of a witness, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt . . . . The intimidation

referred to is the defendant's alleged gesture of simulating a gun with his hand which was made at a court proceeding.'" However, this instruction did not pinpoint specific *evidence* of defendant's alleged gesture, but pinpointed the relationship of the gesture to the defendant's guilt.

Defendant's proposed instruction attempted to take away from the jury the determination of whether he was laboring under a delusion at the time of the October 1 offenses. Defendant sought to have the jury told that his purported delusion and its effects were real. This would have been improper.

Defendant nevertheless contends that the court was required to tailor the instruction in order to make it proper. He argues that "[a] proper instruction would have directed the jury that if it found that the defendant had engaged in sexual acts with S.S. on October 1, 2000 while operating under a temporary delusion that S.S. was his girlfriend Evelyn, the jury may consider this fact as a circumstance tending to negate criminal culpability; and that if, after consideration of all the evidence, the jury had a reasonable doubt that the defendant believed he was licking S.S., the jury must find defendant not guilty of counts one and two."

In *People v. Falsetta* (1999) 21 Cal.4th 903, the defendant was prosecuted for assault with intent to commit rape and other offenses and the trial court admitted evidence of two prior rapes. (*Id.* at pp. 908, 909-910.) The trial court rejected the defendant's proposed instruction on the limited use of the other crimes evidence, and the state Supreme Court concluded that the

instruction was properly rejected. (*Id.* at p. 922.) However, the court further concluded that the trial court erred "in failing to tailor defendant's proposed instruction to give the jury some guidance regarding the use of the other crimes evidence, rather than denying the instruction outright." (*Id.* at p. 924.)

Falsetta is inapposite. There, as the high court explained, the jury was given no guidance on the limited use of the prior offense evidence. Here, the jury was informed that evidence of mistake of fact would negate the mens rea necessary for the offenses. The only thing the jury was not told was that a mistake of fact could be caused by a temporary delusion.

At any rate, any error in failing to revise the mistake-of-fact instruction was harmless. (See *People v. Falsetta*, *supra*, 21 Cal.4th at pp. 924-925; *People v. Watson* (1956) 46 Cal.2d 818, 836.) It is undisputed that defendant orally copulated S.S. There is also evidence of defendant's immediate consciousness of guilt. He tried to bribe S.S. not to inform her mother, and when confronted by Evelyn the next morning, said it "just happened" and asked her to "just let [him] go." Defendant made no mention of his purported delusion in his telephone conversation with Evelyn later that day, but instead expressed his shame. There was also the videotape, which demonstrated defendant's sexual interest in the children a month earlier. Furthermore, defendant argued to the jury that the combination of drugs caused a delusion within the meaning of the mistake-of-fact instruction. Although argument to the jury is

not a substitute for a proper jury instruction, such argument is further support for a finding of harmless error. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1111.)

Defendant's theory was that the combination of medications he supposedly took prior to the offenses induced a delusion that lasted only briefly. Shortly after the offense, defendant was able to think clearly enough to attempt to bribe the victim. The only expert testimony presented by defendant on the point was from a registered nurse, who recounted certain potential side effects from the medications. However, the witness said nothing about whether those effects could be experienced in such a brief fashion. Based on the totality of the evidence, it is not reasonably probable the jury would have reached a different conclusion if the court had modified the mistake-of-fact instruction to include reference to a temporary delusion.

On defendant's alternate argument, there was no error in failing to instruct the jury on the burden of proof applicable to the mistake-of-fact defense. Defendant cites Evidence Code section 502, which states: "The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt." Defendant also cites *People v. Simon* (1995) 9 Cal.4th 493, and *People v. Adrian* (1982) 135 Cal.App.3d 335.

In *Simon*, the state high court concluded that the trial court was required to instruct the jury on the applicable burden of proof for establishing an exemption from a securities violation. The court instructed that the burden was on the defendant, but failed to state the appropriate level of proof required. (*People v. Simon*, *supra*, 9 Cal.4th at pp. 500-501.)

Simon does not assist defendant. The burden here was on the People to prove a lack of mistake beyond a reasonable doubt. The court instructed the jury pursuant to CALJIC No. 2.90 that the burden was on the People to prove defendant guilty beyond a reasonable doubt, and pursuant to CALJIC No. 2.01 that "each fact which is necessary to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt." This would include proof of mens rea. In other words, taking the instructions as a whole, the jury was bound to understand that under the facts of this case, the People were required to prove beyond a reasonable doubt that defendant did *not* think that S.S. was Evelyn when defendant was orally copulating S.S.

In *Simon*, a further instruction was required because the burden was on the defendant to prove an exemption. Hence, the general burden of proof instructions did not suffice. In *People v. Adrian*, *supra*, 135 Cal.App.3d 335, this court concluded that CALJIC Nos. 2.01 and 2.90 were sufficient to inform the jury of the People's burden of proof on all elements of the offense, including negating a defense. (*People v. Adrian, supra,* at p. 342.)

IV

CALJIC No. 2.90

The jury was instructed pursuant to CALJIC No. 2.90 on the meaning of reasonable doubt as follows: "It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. [¶] It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." Defendant contends that this instruction failed to express the degree of certainty required by the Fourteenth Amendment.

In *People v. Hearon* (1999) 72 Cal.App.4th 1285, we indicated that this argument has been consistently rejected in the courts and the issue is "conclusively settled adversely to defendant's position." (*Id.* at p. 1287.) Defendant urges us to re-examine this conclusion, but provides no persuasive argument for doing so. We adhere to our earlier conclusion that the instruction adequately describes the applicable burden of proof.

V

Sanity Instructions

At the sanity phase, the jury was instructed in the language of CALJIC Nos. 4.00 through 4.05. As read by the court, CALJIC No. 4.02 states:

"A person is legally insane if, by reason of mental disease or mental defect, either temporary or permanent, caused in part

by the long continued use of drugs, narcotics, even after the effects of recent use of drugs, narcotics have worn off, he was incapable at the time of the commission of the crime of either:

"1. Knowing the nature and quality of his act; or

"2. Understanding the nature and quality of his act; or

"3. Distinguishing right from wrong.

"However, this defense does not apply when the sole or only basis or causative factor for the mental disease or mental defect is an addiction to, or an abuse of, intoxicating substances."

The court had earlier rejected defendant's request that CALJIC No. 4.02 be modified to insert the language "morally wrong," such that the instruction would have read that he was legally insane if, at the time of the offenses, he "did not know the nature and quality of his act, or . . . he did not know the act to be morally wrong." (Pen. Code, § 25, subd. (D).)

Defendant contends that he was denied due process. He argues that decisional law supports an interpretation of "wrong" within the meaning of the insanity standard as including both legal and moral wrong and cites *People v. Skinner* (1985) 39 Cal.3d 765, *People v. Stress* (1988) 205 Cal.App.3d 1259 and *People v. Coddington* (2000) 23 Cal.4th 529, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, footnote 13.

In *People v. Skinner*, *supra*, 39 Cal.3d 765, the defendant was convicted of murder and the court, sitting without a jury, found him sane at the time of the offense. Evidence had been

presented that the defendant believed the killing was commanded by God. Several years earlier, Penal Code section 25 was enacted as part of Proposition 8. It provided in part: "In any criminal proceeding . . . in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." (Pen. Code, § 25, subd. (b).) The trial court concluded that the defendant was insane under the "right or wrong" prong of the test but sane under the "nature and quality" prong and, because the statute used the conjunctive "and," the court concluded that the defendant had not established his insanity. (*People v. Skinner*, *supra*, 39 Cal.3d at p. 770.)

The Supreme Court reversed. The court concluded that despite use of the conjunctive, the electorate did not intend to change the longstanding M'Naghten test of insanity, which used the disjunctive "or." According to the high court, the test remains that the defendant is insane if he satisfies either the "right or wrong" prong or the "nature and quality" prong. (*People v. Skinner*, *supra*, 39 Cal.3d at pp. 775-777.) The court also rejected the People's argument that the "right or wrong" prong encompassed only legal wrong, not moral wrong. (*Id.* at pp. 778-785.) Quoting from Justice Cardozo, the court said: "'Knowledge that an act is forbidden by law will in most cases

permit the inference of knowledge that according to the accepted standards of mankind, it is also condemned as an offense against good morals. Obedience to the law is itself a moral duty. If, however, there is an insane delusion that God has appeared to the defendant and ordained the commission of a crime, we think it cannot be said of the offender that he knows the act to be wrong.'" (*Id.* at pp. 783-784, quoting *People v. Schmidt* (1915) 216 N.Y. 324, 338-340 [110 N.E. 945, 949-950].)

Relying in part on *Skinner*, the Court of Appeal in *People v. Stress*, *supra*, 205 Cal.App.3d at page 1272, stated: "It is clear that in California 'wrong,' as the term is used in [Penal Code] section 25, subdivision ([b]), refers both to legal wrong and moral wrong." The court concluded that the term "means the violation of generally accepted standards of moral obligation" and not a moral standard peculiar to the defendant. (*Id.* at p. 1275.) In *People v. Coddington*, *supra*, 23 Cal.4th at page 561, footnote 5, the court reiterated that "[a] person 'who is incapable of understanding that his act is morally wrong is not criminally liable merely because he knows the act is unlawful.'"

The foregoing cases make clear that "wrong" within the meaning of Penal Code section 25, subdivision (b), and CALJIC No. 4.02 can be either a legal wrong or a moral wrong. A defendant who is incapable of understanding that his acts are legally or morally wrong is insane for purposes of the Penal Code. However, defendant cites no case supporting his claim that the court erred in failing to set this forth in the

instruction. The instruction as given was neutral in this regard.

However, assuming a trial court is required to give such an instruction in an appropriate case, this is not such a case. The defense here was not that defendant did not understand that his oral copulation of S.S. was morally wrong. Rather, defendant claimed he did not know it was S.S. he was copulating. Defendant's theory was that he knew he was orally copulating someone and presumably knew that orally copulating a minor was both legally and morally wrong, but thought he was with Evelyn at the time. Thus, defendant's proposed modification of the instruction had no bearing on this case and was properly rejected by the trial court.

VI

One Strike Law Sentencing

As earlier summarized, defendant was convicted on count II of lewd or lascivious acts with a child under the age of 14 by use of force (Pen. Code, § 288, subd. (b)(1)) and sentenced, pursuant to Penal Code section 667.61, subdivision (b) to an indeterminate term of 15 years to life, tripled under the three strikes law (Pen. Code, § 667, subd. (e)(2)(A)(1)) to 45 years to life. Identical terms were imposed on three other counts, two of which (counts IV and V) were ordered to be served consecutively to the sentence on count II and one of which (count III) was ordered to be served concurrently with the

sentence imposed for count II. The sentence on the remaining count (count I) was stayed pursuant to Penal Code section 654.

Defendant contends that use of Penal Code section 667.61 on counts one, two and three was improper. Those counts involved the three offenses committed against S.S. on October 1. Defendant argues that under the statute, the multiple victim provision is the only possible basis for the application of Penal Code section 667.61, but there was only one victim on October 1. He argues that the court could not bootstrap offenses committed on September 3 against multiple victims onto the charges that arose from his crimes against S.S. alone on October 1. We find there was no error.

Penal Code section 667.61 was enacted in 1994 as part of what is commonly known as the one strike law. (*People v. Rayford* (1994) 9 Cal.4th 1, 8.) Subdivision (b) of that section reads, in relevant part: "[A] person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years . . . ." Penal Code section 667.61, subdivision (c) includes a violation of Penal Code section 288, subdivision (b) (Pen. Code, § 667.61, subd. (c)(4)) and Penal Code section 288, subdivision (a) (Pen. Code, § 667.61, subd. (c)(7)).

Penal Code section 667.61, subdivision (e) reads:

"The following circumstances shall apply to the offenses specified in subdivision (c):

"(1) [T]he defendant kidnapped the victim of the present offense in violation of Section 207, 209, or 209.5.

"(2) [T]he defendant committed the present offense during the commission of a burglary, as defined in subdivision (a) of Section 460, or during the commission of a burglary of a building . . . .

"(3) The defendant personally inflicted great bodily injury on the victim or another person in the commission of the present offense . . . .

"(4) The defendant personally used a dangerous or deadly weapon or firearm in the commission of the present offense . . . .

"(5) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim.

"(6) The defendant engaged in the tying or binding of the victim or another person in the commission of the present offense.

"(7) The defendant administered a controlled substance to the victim by force, violence, or fear in the commission of the present offense . . . ."

Defendant argues that all the other circumstances listed in Penal Code section 667.61, subdivision (e) address conditions relating to the "present offense" and, therefore, despite use of the phrase "case or cases" in Penal Code section 667.61, subdivision (e)(5), this circumstance should likewise be read as limited to situations where there were multiple victims of the

offense or offenses for which the term of imprisonment is being imposed.

We are not persuaded. In matters of statutory interpretation, our fundamental concern is with legislative intent. (*Brown* v. *Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724.) We determine such intent by looking first "to the words of the enactment, giving them their usual and ordinary meaning." (*Trope* v. *Katz* (1995) 11 Cal.4th 274, 280.) Penal Code section 667.61, subdivision (e)(5) uses the phrase "case or cases" rather than "present offense." "Where the same word or phrase might have been used in the same connection in different portions of a statute but a different word or phrase having different meaning is used instead, the construction employing that different meaning is to be favored." (*Playboy Enterprises, Inc. v. Superior Court* (1984) 154 Cal.App.3d 14, 21.)

The statutory intent and scheme of Penal Code section 667.61, subdivision (e) is not difficult to discern. Where the "present offense" against a victim is a qualifying offense and the gravity of that offense is enhanced by one of the circumstances enumerated in subdivisions (e)(1), (e)(2), (e)(3), (e)(4), (e)(6), or (e)(7), the life sentence mandated by the statute shall apply. But even in circumstances where the subdivisions enumerated above do not apply if a qualifying offense has been committed against more than one victim, the criminal conduct is considered equally severe and that conduct merits application of the statute so long as those offenses are prosecuted in a single case presently before the court or in

more than one case presently before the court where separate cases have been consolidated for trial.

We note that a single sex "offense" typically involves, and is charged as, a single criminal wrong against a single victim. Where a defendant commits two sexual wrongs against a single victim, he has committed two "offenses." Where a defendant commits an offense against two victims, he has committed two "offenses." If we were to accept defendant's interpretation of Penal Code section 667.16, subdivision (e)(5) as applying only where there are multiple victims "in the present offense," this circumstance would rarely, if ever, exist. For example, given defendant's interpretation of the statute, subdivision (e)(5) would not apply to the offenses committed against S.S. *and* M.S. on September 3, even though defendant had multiple victims on that occasion, because defendant was charged with one offense for a lewd act against S.S. and another offense for a lewd act against M.S.

In any event, we must assume that the Legislature knew the difference between an "offense" and a "case" and meant what it said. That is especially true where, as here, the sentencing scheme makes perfect sense.

We find support for our holding in *People v. Jones* (1997) 58 Cal.App.4th 693, in which matter the defendant went on a month-long robbery spree during which, when the opportunity arose, he sexually assaulted his victim. He was convicted of 17 offenses arising out of four separate incidents and sentenced to 63 years eight months to life in state prison, including four

terms under the one strike law. (*Id.* at p. 698.) The information had alleged four one-strike circumstances: aggravated kidnapping with respect to one victim; simple kidnapping with respect to another; deadly weapon use; and multiple victims. The Court of Appeal concluded, among other things, that the defendant was properly sentenced under the one strike law pursuant to the multiple victim circumstance, even though there was only one victim in each of the separate offenses. (*Id.* at pp. 709-712; see also *People v. Wutzke* (2002) 28 Cal.4th 923, 927, 944 [one strike sentences proper for four offenses committed on different occasions against two victims].)

The result is the same here. Even though there was only one victim on October 1, there were multiple victims of defendant's criminal acts and the offenses against each of those victims were tried together in the present case. The one strike law applies to all of the charged offenses.

Defendant nevertheless contends that the application of Penal Code section 667.61 to the offenses committed on October 1 violates his Fourteenth Amendment right to equal protection. He argues that such application is only possible because the prosecutor chose to try the October 1 and September 3 offenses together. According to defendant, he "is similarly situated to any defendant who is being tried separately for offenses committed on two different occasions" but was sentenced more harshly.

"Broadly stated, equal protection of the laws means 'that no person or class of persons shall be denied the same

protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness.'" (*People v. Wutzke*, *supra*, 28 Cal.4th at p. 943.) To support an equal protection claim, a party must show "the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530, italics omitted.)

Defendant claims that he was subjected to potentially harsher sentencing because of the prosecutor's choice to try all charges in one proceeding. He claims that he was treated differently from a hypothetical defendant prosecuted in two separate proceedings who likewise committed offenses on two separate occasions, one involving multiple victims.

Defendant's equal protection claim has no merit. The courts of this state have consistently held that differences in treatment of a criminal defendant based on prosecutorial discretion do not implicate equal protection. For example, the state high court has held that a prosecutor's discretion whether to seek the death penalty in a given case does not, in and of itself, give rise to equal protection concerns. (*People v. Ray* (1996) 13 Cal.4th 313, 359; *People v. Keenan* (1988) 46 Cal.3d 478, 505.) Likewise, in *People v. Taylor* (2001) 93 Cal.App.4th 318, this court concluded that equal protection is not violated where a prosecutor has discretion whether to charge a firearm use enhancement under Penal Code section 12022.53 (providing a set punishment of 10 years) or Penal Code section 12022.5

(providing a range of punishments). We explained: "'"Prosecutors have great discretion in filing criminal charges. [Citation.] This discretion includes the choice of maximizing the available sentence (including charging of enhancements) to which a defendant might be exposed in the event of conviction [citations] and the timing of filing unrelated charges [citations]. Such discretion does not violate equal protection."'" (*People v. Taylor, supra,* at p. 323.)

In *Manduley v. Superior Court* (2002) 27 Cal.4th 537, the Supreme Court found no equal protection problem in Welfare & Institutions Code section 707, subdivision (d)(1), which grants prosecutors discretion to file charges in criminal court against a minor who is at least 16 years old. The court explained that "all minors who meet the criteria enumerated in [Welfare & Institutions Code] section 707[, subdivision](d) equally are subject to the prosecutor's discretion whether to file charges in criminal court. Any unequal treatment of such minors who commit the same crime under similar circumstances results solely from the decisions of individual prosecutors whether to file against particular minors a petition in juvenile court or instead an accusatory pleading in criminal court. Although, as petitioners assert, a prosecutor's decision in this regard can result in important consequences to the accused minor, so does a decision by a prosecutor to initiate criminal charges against *any* individual, including an adult. Claims of unequal treatment by prosecutors in selecting particular classes of individuals for prosecution are evaluated according to ordinary equal

protection standards. [Citation.] These standards require the defendant to show that he or she has been singled out deliberately for prosecution on the basis of some invidious criterion, and that the prosecution would not have been pursued except for the discriminatory purpose of the prosecuting authorities. [Citation.] '[A]n invidious purpose for prosecution is one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement interests . . . .'" (*Manduley v. Superior Court, supra,* at pp. 568-569.)

Here, defendant does not claim that Penal Code section 667.61 contains some invidious standard for determining when separate charges will be prosecuted together. Nor does he claim he was singled out for joint prosecution of the September 3 and October 1 offenses for some invidious purpose. Defendant's equal protection claim is therefore without merit.

Finally, defendant contends that he was improperly sentenced to three life terms for the three October 1 offenses. He argues that Penal Code section 667.61, subdivision (g) authorizes only one such term "for any offense or offenses committed against a single victim during a single occasion." (Pen. Code, § 667.61, subd. (g).) Defendant argues that all three offenses were committed against a single victim, S.S., on a single occasion. We agree.

In *People v. Jones* (2001) 25 Cal.4th 98, the Supreme Court analyzed the phrase "single occasion" as used in section 667.61, subdivision (g). The court rejected use of the interpretation

given to the phrase "separate occasion" in Penal Code section 667.6, subdivision (d), which recognizes separate occasions whenever there is a reasonable opportunity for reflection between offenses. The court explained: "[A]pplying the reasonable opportunity for reflection analysis of Penal Code section 667.6, subdivision (d) to sentencing determinations under Penal Code section 667.61, subdivision (g) appears inconsistent with the reference by the Legislature in the latter provision to 'multiple victims during a single occasion.' In the case of a defendant who sequentially assaults multiple victims even in close temporal and spatial proximity, it would be difficult to imagine the crimes ever occurring 'during a single occasion' under Penal Code section 667.61, subdivision (g), because the perpetrator would virtually always have an opportunity for reflection when changing victims." (*People v. Jones*, *supra*, 25 Cal.4th at p. 106.) The court instead adopted the following rule: "[F]or purposes of Penal Code section 667.61, subdivision (g), sex offenses occurred on a 'single occasion' if they were committed in close temporal and spatial proximity." (*People v. Jones*, *supra*, 25 Cal.4th at p. 107.) According to the court, this rule "should result in a *single* life sentence, rather than three consecutive life sentences, for a sequence of sexual assaults by defendant against one victim that occurred during an uninterrupted time frame and in a single location." (*Ibid.*)

Under the foregoing rule, defendant may be sentenced to only one life term under Penal Code section 667.61 for the three

offenses committed against S.S. on October 1. Terms for the other offenses must be imposed as authorized elsewhere in the Penal Code. Of course, while the trial court here imposed three life terms for the three October 1 offenses, one term was stayed and the other was run concurrently. Thus, there will be no net effect on defendant's aggregate sentence.

VII

Cruel and Unusual Punishment

Defendant contends that the sentence imposed in this matter amounts to cruel and unusual punishment, prohibited by the both the state and federal Constitutions. He is wrong.

The Eighth Amendment to the federal Constitution "'forbids only extreme sentences that are "grossly disproportionate" to the crime.'" (*Ewing v. California* (2003) 538 U.S. __ [155 L.Ed.2d 108, 119] (lead opn. of O'Connor, J.), quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 [115 L.Ed.2d 836, 869] (conc. opn. of Kennedy, J.).) The California Constitution forbids punishment that is "so disproportionate to the crime . . . that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

The sentence imposed in this matter reflects the interplay between the one strike and three strikes laws. The one strike portion reflects society's particular abhorrence for the type of crimes committed in this instance. The three strikes portion reflects society's concern with repeat offenders.

Defendant's sentence does not violate either the state or federal Constitution. It is based on both the current offenses and defendant's recidivist criminal behavior. (See *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630; see also *Rummel v. Estelle* (1980) 445 U.S. 263, 284-285 [63 L.Ed.2d 382, 397-398].) Defendant has demonstrated by his actions that he has continued to pursue a life of crime. "If increased penalties do not deter the repeat offender, then society is warranted in segregating that person for an extended period of time." (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1512.) Indeed, the United States Supreme Court recently rejected a federal constitutional challenge to a three strikes sentence for a recidivist offender who stole some golf clubs. (See *Ewing v. California*, *supra*, 538 U.S. [155 L.Ed.2d 108].)

DISPOSITION

The convictions are affirmed. The matter is remanded for resentencing. Following resentencing, the trial court shall amend the abstract of judgment and forward a certified copy to the Department of Corrections. **(CERTIFIED FOR PARTIAL PUBLICATION.)**

HULL, J.

We concur:

SCOTLAND, P.J.

DAVIS, J.